APPENDIX A

STATUTES

Internal Revenue Code of 1939

SEC. 117 CAPITAL GAINS AND LOSSES.—[effective with respect to the calendar years 1946-1949]

* * *

(j) GAINS AND LOSSES FROM INVOLUNTARY CONVERSION AND FROM THE SALE OR EXCHANGE OF CERTAIN PROPERTY USED IN THE TRADE OR BUSINESS.—

(1) DEFINITION OF PROPERTY USED IN THE TRADE OR BUSINESS.—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k)(1) or (2) is applicable. Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 [6] months or more from the date of acquisition.

(2) GENERAL RULE.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the

threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

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SEC. 1141. COURTS OF REVIEW.

(a) JURISDICTION.—The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in Section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of Title 28 of the United States Code.

• • •

Internal Revenue Code of 1954

SEC. 7482. COURTS OF REVIEW

(a) JURISDICTION.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * *

Federal Rules of Civil Procedure

RULE 52. FINDINGS BY THE COURT

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient, if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * *

APPENDIX B

Judgment Below

HARRY SLATKIN BUILDERS, INC., *Petitioner*

vs

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

ORDER

(Filed June 14, 1956)

This case came on to be heard on the record and briefs and oral arguments of counsel:

And it appearing that the controlling question in the case is whether the dwelling units sold by petitioner during the years 1946 to 1949, inclusive, were held by petitioner for investment or held by petitioner primarily for sale to its customers in the ordinary course of its business, Internal Revenue Code (1939), Section 117(a)(1), 117 (j)(1);

And it appearing that this is a question of fact, *Rubino* v. *Commissioner of Internal Revenue*, 186 Fed. (2d) 304 (C.A. 9), certiorari denied 342 U.S. 814; *Dougherty* v. *Commissioner of Internal Revenue*, 216 Fed. (2d) 110, 111 (C.A. 6); *Paul W. Shepherd, Jr.* v. *United States of America*, 231 Fed. (2d) 445 (C.A. 6);

And it appearing that the findings of the Tax Court are not clearly erroneous;

IT IS ORDERED that the decision of the Tax Court be and it hereby is affirmed.

Approved for entry:

/s/ FLORENCE E. ALLEN
United States Circuit Judge

APPENDIX C

Counter-Statement of Facts in Brief for the Respondent Before the Sixth Circuit

The taxpayer's statement (Br. 2-9) contains argumentative matter and only partially accords with, and does not fully reflect, the essential facts as found by the Tax Court (R. 3a-12a).[1] A re-statement is therefore made as follows (R. 4a-12a):

The taxpayer was incorporated under the laws of the State of Michigan in 1931 under the name of Nine Minute Auto Wash, Inc. On or about April 2, 1935, its corporate name was changed to Harry Slatkin, Inc., and its charter was further amended to include as an authorized activity the business of building and general contracting and all other acts incident and necessary thereto. On or about June 6, 1941, the taxpayer's name was changed to Harry Slatkin Builders, Inc. (R. 4a.)

The taxpayer kept its books and records and filed its federal tax returns on the accrual basis for taxable years ending December 31. Timely income tax returns for the years 1946 to 1949, inclusive, were filed with the Collector of Internal Revenue for the District of Michigan at Detroit. In its 1943 return the taxpayer described its business as that of "general contractors and real estate." In 1944 and 1945 it used the description "building contractors," in 1946 "general building contractors," and in 1947, 1948 and 1949 "general contractors." (R. 4a.)

In 1941 the taxpayer commenced the construction of one-family frame houses for sale, financing them by short-term construction loans secured by mortgages on the properties. These houses were sold either during construction or upon completion. With the imposition of wartime regulations

[1] Record references are to the appendix to the taxpayer's brief, separately bound.

upon residential construction, the taxpayer submitted numerous applications to the War Production Board (hereinafter referred to as WPB), for the approval of construction of single houses for sale. Pursuant to such approval, the taxpayer constructed the following single houses, which were sold during construction and upon completion (R. 4a):

Year	Number of Houses	Approximate Average Sales Price	Approximate Sales
1941	15	$5,000	$ 75,000
1942	46	5,000	230,000
1943	101	5,850	590,000
1944	65	6,700	435,000
1945	15	6,700	100,000
1946	76	8,000	608,000

The advent of World War II, with the consequent mobilization of industry in Detroit for war production, created a demand for labor far in excess of the local supply and the resulting immigration of defense plant workers created a serious housing shortage. Government restrictions were imposed on building materials and regulations were issued by the National Housing Agency (hereinafter referred to as the NHA) respecting the construction of houses for war workers. Builders were required to apply to the WPB for approval of residential projects in order to obtain priorities for materials entering into such construction. Building specifications and arrangements for financing of such housing were subject to the approval of the Federal Housing Administration (hereinafter referred to as the FHA). (R. 5a.)

Under the NHA regulations effective as of November 17, 1943, private war housing begun on or after February 10, 1943, could be disposed of only to a war worker occupant who had been such for two months or to an eligible war worker if such sale was made within fifteen days after the issuance by the FHA of its completion report. Only one-third of a promoter's houses could be sold under

the second method and then only at prices not in excess of maximums previously approved by the NHA. Regional representatives of the NHA were authorized to relax such requirements under certain circumstances. (R. 5a.)

In 1943 the taxpayer submitted four applications to the WPB for the construction of two defense housing rental projects. Three of the applications concerned the proposed construction of 84 family dwelling units in 42 duplex buildings on Evergreen Road between Westfield Street and Joy Road in Detroit, hereinafter referred to as the Detroit project. The fourth application was with respect to the construction of 44 family dwelling units, consisting of 22 duplex buildings, on Outer Drive between Wilson and Lawrence Streets in the City of Dearborn, a suburb of Detroit, hereinafter referred to as the Dearborn project. (R. 5a.) Pertinent information with respect to the applications for the Detroit project is as follows (R. 6a):

Date of Application	Date Approved	Number of Family Dwelling Units	Monthly Shelter and Services Charges Requested and Approved	Sales Price Requested and Approved
1/ 8/43	3/ 6/43	44	$56	$6,000
7/30/43	9/10/43	30	56	None
9/16/43	10/16/43	10	54	None

The $6,000 sales price under the application dated January 8, 1943, was with respect to only 22 of the 44 units involved. Construction of the units under this application was commenced in May of 1943 and they were completed between September 1943 and January 1944, inclusive. Construction of the units under the applications of July 30, 1943, and September 16, 1943, was completed during the period from June, 1944, to December, 1944, inclusive, except that only eight units were constructed under the latter application rather than the ten which had been approved. (R. 6a.)

On August 12, 1943, a petition for change in stipulated rental or sales price and a petition to rent war housing begun prior to February 10, 1943, were submitted to the NHA with respect to the 44 units covered by the application of January 8, 1943. These petitions were approved on or about August 30, 1943, resulting in an increase of the monthly rental of these units to $60.50 and the granting of permission to rent the 22 units originally designated for sale. (R. 6a.)

On August 20, 1943, an application for the approval of the construction of 44 family dwelling units consisting of 22 duplex buildings in the Dearborn project was submitted to the WPB and was approved on September 7, 1943. The approval authorized a charge of $56 for both shelter and tenant services but since no sales price was sought to be established, none was fixed. All 44 of the units in the Dearborn project were initially rented by the taxpayer under the war housing regulations and have been rented continuously up to the present time. (R. 6a-7a.)

On October 1, 1943, the taxpayer prepared an application for submission to the WPB for approval of the construction of 36 duplex buildings (72 family dwelling units) on Woodworth and Ternes Streets between Michigan Avenue and Gildow Street in Dearborn, Michigan. This application was not submitted because the taxpayer was unable to acquire the land upon which it proposed to construct such units. (R. 7a.)

On March 15, 1944, petitions were filed with the NHA for the approval of increases in the monthly rental charges and the sales prices of the units in both the Detroit and the Dearborn projects. The relief requested and that approved was as follows (R. 7a):

(a) Two petitions, one for an increase in rent and the other for an increase in selling price, were filed for the 30 units in the Detroit project covered by the application of July 30, 1943. The applications sought the establish-

ment of a sales price for 20 of the units of $6,400 and an increase in the stipulated rent, including that for tenant services, to $61. A monthly rental charge of $59 was approved on April 27, 1944, and a sales price of $6,125 was approved on September 7, 1944. (R. 7a.)

(b) A petition for the establishment of a sales price of $6,400 for five of the eight units of the Detroit project constructed under the application of September 16, 1943, was submitted on or about March 15, 1944, but was approved on September 7, 1944, only to the extent of $6,125. The remaining three units were designated for rent. (R. 7a.)

(c) A petition for an increase in the total charge for rent of the 44 units in the Dearborn project from $56 to $61 was submitted on or about March 15, 1944, and was approved on April 27, 1944, in the amount of $59. (R. 7a.)

Two of the 82 units constructed by the taxpayer in the Detroit project were sold upon completion in 1944, and the remaining units were rented until sold as follows (R. 8a):

Year sold	Number of units
1945	3
1946	73
1947	1
1948	1
1949	2
	80

The units sold in 1944 and 1945 were disposed of because of title difficulties and because of the poor condition of the units themselves. (R. 8a.)

The Dearborn project proved to be much more profitable that the Detroit project, each unit therein showing a net return for 1945 of $138.30, whereas the units in the Detroit project produced only $66.70 each in that year. The difference was due both to a lower tax rate on the Dearborn properties and to the fact that the tenants in the Detroit

units paid little or no attention to the maintenance of their premises and disregarded the efforts of the taxpayer's caretaker to maintain the properties. Because of this lack of care, the taxpayer's officers concluded that the Detroit units were deteriorating rapidly and that the net return was even less than that shown by the books. (R. 8a.)

On October 15, 1945, all Government restrictions with respect to the disposition of the dwelling units in the two projects were removed but the ceilings on rents were retained. Late in 1945 or early in 1946, the taxpayer's officers decided to dispose of the properties of the Detroit project and discussed their sale with a real estate broker, Paul Frischkorn. Frischkorn was the nephew of the president of Frischkorn Construction Company, which built homes having an excellent reputation in the Detroit area. Early in 1946 the broker was instructed to proceed with the sale of the Detroit units but since he and the taxpayer's officers were friends, no written agreement was entered into. Two large roadside signs were erected on the project which advertised the properties to be sold under the name of Frischkorn and gave the broker's telephone number. However, purchasers were informed, at least by the time of the closing, that the homes had been built by the taxpayer. Although the broker occasionally discussed the sales prices with the taxpayer's officers, the latter remained in control of the disposition of the houses and the prices were changed by them from time to time. (R. 8a-9a.) The 77 remaining units were disposed of as follows (R. 9a):

1946	Units
January	2
February	14
March	16
April	8
May	6
June	6
July	7
August	8
September	2
October	3
November	0
December	1
Total	73
October 1947	1
May 1948	1
January 1949	2
	77

The sales prices in 1947 ranged from approximately $6,700 to approximately $7,300. The broker personally sold 71 of the 77 units offered for sale. (R. 9a.)

Since the early part of 1946, the taxpayer has engaged in a number of real estate projects apart from the continued rental of the units of the Dearborn project. They included the acquisition of certain undeveloped land on March 22, 1946, in Detroit, on which it was proposed to construct a housing project, and the making of a deposit on November 16, 1946, of $500 towards the purchase of land in Dearborn adjacent to its rental project for the purpose of constructing multiple dwellings. Both projects had to be abandoned due to the inability of the taxpayer to obtain a reclassification of the applicable zoning restrictions. (R. 9a-10a.)

In the latter part of October, 1947, the taxpayer purchased land in Detroit in the vicinity of Southfield Road and the Chesapeake and Ohio Railroad line and had preliminary sketches prepared for a proposed housing project to be erected on this parcel. However, due to the proximity of the railroad, the taxpayer was unable to obtain financing for the project. (R. 10a.)

In January of 1948, the taxpayer caused the formation of three corporations for the purpose of owning and operating housing projects on a tract of land acquired by the taxpayer in Dearborn. Mortgage insurance for the construction loans was obtained from the FHA under the provisions of section 608 of Title VI of the National Housing Act. The taxpayer received the entire outstanding common stock of the three corporations in exchange for a conveyance of the land. The entire authorized preferred stock of the corporations was issued to FHA. The construction of the project was completed during 1949 and 1950. The number of units and the cost were as follows (R. 10a):

Subsidiary	Number of Units	Construction Cost
Oxford Apartments, Inc.	32	$285,399.32
Vassar Apartments, Inc.	56	504,567.56
Columbia Apartments, Inc.	28	248,517.85

The dwelling units contained in each of the projects were rented upon completion and have been rented continuously since that time by the respective corporations. (R. 10a.)

In connection with the foregoing development, the taxpayer constructed in its own name a four-family flat on Madison Street in Dearborn at a total cost of $31,496.89, for which no financing was required. The building was rented upon completion and has been rented continuously by the taxpayer ever since. In 1950 the taxpayer completed the construction of a retail store building at a cost of $123,212.49 on land owned by it at Plymouth Road and Rutland Street in Detroit. This building was rented upon completion to the Kroger Grocery Company under a five-year lease executed in 1949 with a provision for renewal. The land upon which the building was erected had been acquired by the taxpayer as part of a larger tract known as Harry Slatkin Plymouth Subdivision, and the balance of this tract was used by the taxpayer in the construction of approximately 110 houses for sale. (R. 10a-11a.)

In 1950 the taxpayer acquired a tract of land in Royal Oak, Michigan, another suburb of Detroit, and in 1952 completed the construction thereon of a housing project of 25 family units known as Webster Terraces at a cost of $277,050.89. Each of the units was rented upon completion and had been rented continuously at the time of the hearing. (R. 11a.)

In 1952 the taxpayer acquired another tract of land in Royal Oak and commenced the construction thereon of 40 duplex buildings (80 family dwellings) at an estimated cost of $880,000. Approximately one-half of the dwelling units had been completed at the time of the hearing and were being rented by the taxpayer. In addition, two brick buildings constructed by the taxpayer in 1950 on land owned by it on James Couzens Highway in Detroit at a cost of $59,271.25 were also being rented. (R. 11a.)

The taxpayer's gross sales, exclusive of the sales involved in this proceeding, and the taxpayer's gross income from rents for the taxable years 1941 to and including 1952 were as follows (R. 11a, 12a):

Year	Gross Sales	Gross Income From Rents
1941	$ 72,372.25	.....
1942	230,752.52	.....
1943	590,270.67	$ 6,824.25
1944	434,360.48	55,409.80
1945	97,404.36	76,258.98
1946	853,510.73	47,385.06
1947	675,405.71	32,470.83
1948	447,328.95	34,182.89
1949	1,186,120.85	33,417.00
1950	1,260,820.98	44,444.11
1951	2,133,940.00	53,994.06
1952	3,239,658.02	66,994.04

During the years 1949 to and including 1952, the total income from rents received by the three corporations organized in 1948, all of the common stock of which was owned by the taxpayer, was as follows (R. 12a):

Year	Income from Rents
1949	$ 22,586.11
1950	122,954.26
1951	122,458.60
1952	123,597.90

The amounts of gain in each year from the sale of the 77 family dwelling defense housing units (Detroit project) during the years 1946 through 1949, some of which were reported on the installment method under Section 44 of the Internal Revenue Code of 1939, were $84,822.79, $22,015.92, $17,326.22 and $11,835.02, respectively. (R. 3a.) The Commissioner determined that such gains constituted ordinary income and declined to permit the taxpayer to treat them as long-term capital gains, determining deficiencies in tax for each of such years accordingly. (R. 21a.) The Tax Court found that the dwelling units constituting this project and sold by the taxpayer during the years 1946 to 1949, inclusive, were held by it primarily for sale to its customers in the ordinary course of its trade or business, and entered its decision accordingly. (R. 18a, 19a.) From this decision the taxpayer has petitioned this Court for a review. (R. 84a.)

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 493

HARRY SLATKIN BUILDERS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 3a-18a)[1] is not reported. The *per curiam* opinion of the Court of Appeals (Pet. 4a) is reported at 235 F. 2d 189.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956. (Pet. 4a.) Taxpayer's petition for rehearing was denied on July 11, 1956. The petition

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[1] Record references are to the appendix to taxpayer's brief in the court below.

for a writ of certiorari was filed on October 9, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether, on the facts of this case, the two courts below were correct in finding that the property involved was held primarily for sale to customers in the ordinary course of the taxpayer's trade or business with the consequence that the profits from its sale were taxable as ordinary income.

STATUTE INVOLVED

Sections 22(a) and 117(a)(1) and (j)(1) and (2) of the Internal Revenue Code of 1939 [2] are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

A full statement of the facts appears in Appendix C to the petition (Pet. App. 5a). They may be briefly summarized as follows.

1. *The housing units here involved.* This case concerns the tax on the profit from the sale of 77 dwelling units of what is referred to as the "Detroit project". Construction of these units was completed at various times in 1943 and 1944 (R. 6a). Two units of the project were sold upon completion in 1944. Three were first rented and then sold in 1945. These sales were made because of title difficulties and the poor condition of the units (R. 8a). The 77 units here involved were all first rented by taxpayer. At that time there were governmental regulations both establishing rent

[2] Unless otherwise noted references to the "Code" or "Internal Revenue Code" will be to the Internal Revenue Code of 1939.

ceilings and restricting the sale of these units to war workers meeting certain qualifications.

On October 15, 1945, all governmental restrictions respecting disposition of these housing units were removed, but rent ceilings continued. Shortly thereafter, because of the low income being obtained from the Detroit project and because of the deteriorating condition of the buildings, taxpayer decided to sell all units of that project. Early in 1946 taxpayer made an oral arrangement with a broker and two large signs were erected on the property advertising the sale of the houses under the broker's name. The project was sold not as an entity but to individual buyers of the separate units. The sales of the 77 units were spread over a substantial period of time as follows (R. 9a):

1946	Units
January	2
February	14
March	16
April	8
May	6
June	6
July	7
August	8
September	2
October	3
November	0
December	1
Total	73
October 1947	1
May 1948	1
January 1949	2
	77

2. *Related business activities of taxpayer.* Since 1941 taxpayer has been active in the construction, sale and renting of housing. Simultaneously with the construction of the Detroit project taxpayer built a Dearborn project of 44 units. All of these units have been rented continuously by taxpayer until the present time (R. 6a-7a). Three subsidiary corporations, of which

taxpayer owns all the common stock, built housing projects in 1949 and 1950 of 28, 32 and 56 units, respectively. These units were rented upon completion and have been rented continuously since that time (R. 10a).

Throughout the period, however, the bulk of taxpayer's gross income was from the construction and sale of housing. Taxpayer's gross sales, exclusive of the sales involved in this proceeding, and taxpayer's gross income from rents for the taxable years 1941 to and including 1952 were as follows (R. 11a-12a):

Year	Gross Sales	Gross Income from Rents
1941	$ 72,372.25	.....
1942	230,752.52	.....
1943	590,270.67	$ 6,824.25
1944	434,360.48	55,409.80
1945	97,404.36	76,258.98
1946	853,510.73	47,385.06
1947	675,405.71	32,470.83
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1949	1,186,120.85	33,417.00
1950	1,260,820.98	44,444.11
1951	2,133,940.00	53,994.06
1952	3,239,658.02	66,994.04

A more detailed statement of the facts regarding taxpayer's activities in the construction, selling and renting of housing is given in the appendix to the petition (Pet. App. 5a-14a).

3. *Rulings below.* During the years 1946 to 1949 taxpayer realized gains on the sale of 77 units of the Detroit project totalling $135,999.95 (R. 3a). The Commissioner determined that these gains constituted ordinary income and declined to permit the taxpayer to treat them as long-term capital gains (R. 21a); accordingly, the Commissioner determined deficiencies in tax for each of those years (R. 3a). The Tax Court found that the dwelling units constituting the Detroit project and sold by taxpayer during the

years 1946 to 1949, inclusive, were held by taxpayer primarily for sale to its customers in the ordinary course of its trade or business (R. 12a) and sustained the deficiencies in dispute (R. 19a) for the reasons stated in its opinion (R. 13a-18a).

The court below affirmed *per curiam* (Pet. 4a).

ARGUMENT

The decision below was correct and turns on the particular facts of the case; there is no conflict among the courts of appeals as to the proper standard in reviewing the factual determinations involved in this class of cases.

1. The court of appeals below was correct in holding (Pet. 4a)—

> that the controlling question in the case is whether the dwelling units sold by petitioner during the years 1946 to 1949, inclusive, were held by petitioner for investment or held by petitioner primarily for sale to its customers in the ordinary course of its business, Internal Revenue Code (1939), Section 117(a)(1), 117(j)(1); * * *

and (Pet. 4a) "that this is a question of fact". Determination by the courts below of a question of this nature presents no adequate ground for certiorari.

The Tax Court pointed out the types of facts which are controlling (R. 14a-15a):

> in determining whether or not property is held primarily for sale or for investment purposes, the courts have usually considered such factors as the purpose or nature of the acquisition of the property, the continuity of sales or sales related activities over a period of time, the frequency of the

> sales as opposed to isolated transactions, and the extent and substantiality of the transactions, as well as the activity of the seller or those acting under his instructions or on his behalf.

Thus whether or not in a particular case property is held primarily for sale to customers in the ordinary course of taxpayer's trade or business turns on many factual indicia and on the weight to be given each under the peculiar circumstances of a given record.[3]

The Government has, therefore, consistently emphasized the nature of the issue involved in cases of this kind and the inappropriateness of Supreme Court review. *Shearer* v. *Smyth*, 221 F. 2d 478 (C.A. 9), certiorari denied, 350 U.S. 840; *Rubino* v. *Commissioner*, 186 F. 2d 304 (C.A. 9), certiorari denied, 342 U.S. 814; *King* v. *Commissioner*, 189 F. 2d 122 (C.A. 5), certiorari denied, 342 U.S. 829. The same considerations underlay the Government's determination not to seek certiorari in *Smith* v. *Dunn*, 224 F. 2d 353 (C.A. 5), and *Goldberg* v. *Commissioner*, 223 F. 2d 709 (C.A. 5), both decided in 1955, and in the recent Third Circuit decision in *Curtis Co.* v. *Commissioner*, 232 F. 2d 167.

2. Without restating the circumstances in detail, we think it clear that the court below did not err in sustain-

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[3] Cases in the Courts of Appeal holding that no one test is decisive and that this question is one of fact, are legion, e.g., *Harriss* v. *Commissioner*, 143 F.2d 279 (C.A. 2); *Mauldin* v. *Commissioner*, 195 F.2d 714 (C.A. 10); *Victory Housing No. 2* v. *Commissioner*, 205 F.2d 371 (C.A. 10); *Home Co.* v. *Commissioner*, 212 F.2d 637 (C.A. 10); *Dillon* v. *Commissioner*, 213 F.2d 218 (C.A. 8); *Dougherty* v. *Commissioner*, 216 F.2d 110 (C.A. 6); *Winnick* v. *Commissioner*, 223 F.2d 266 (C.A. 6); *Cohn* v. *Commissioner*, 226 F.2d 22 (C.A. 9); *Homann* v. *Commissioner*, 230 F.2d 671 (C.A. 9); *Pacific Homes* v. *United States*, 230 F.2d 755 (C.A. 9); *Shepherd* v. *United States*, 231 F.2d 445 (C.A. 6).

ing the findings of the Tax Court (Pet. 4a). The Tax Court's determination was supported by taxpayer's frequent, continuous and substantial sales in 1946 (R. 15a), by taxpayer's disposal of all Detroit project units after controls on sales were lifted at prices much higher than those which were obtainable while controls were in effect (R. 15a), by the evidence that taxpayer had a dual purpose, namely, to rent the Detroit units only for so long a period as the rental income produced a better return than would the proceeds of a sale (R. 16a), by the activities of taxpayer and of the broker acting on its behalf sufficient to constitute a business (R. 16a), by the facts adduced with respect to taxpayer's post-war rental projects, showing that a very small fraction of its post-war income has been derived from rental properties compared to its income derived from sales. The Tax Court noted that taxpayer's activity in constructing and selling residential properties increased greatly during and after the war years, rising from approximately $72,000 in 1941 to $850,000 in 1946 and to over $3,000,000 in 1952 (R. 13a); that taxpayer continued in the business of constructing houses for sale throughout the period 1946 to 1952 and with the exception of 1945 its rental income was never more than five to ten percent of its income derived from sales exclusive of the sales here in issue (R. 17a). During 1950 to 1952 this percentage dropped to between two and five percent (R. 17a).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
I. HENRY KUTZ,
Attorneys.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income * * * from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

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(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [As amended by Section 115(b), Revenue Act of 1941, c. 412, 55 Stat. 687, and Section 151(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), or an obligation of the

United States or any of its possessions, or of a State or Territory or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, or real property used in the trade or business of the taxpayer;

* * * * *

(j) [As added by Section 151(b), Revenue Act of 1942, *supra*] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction

in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

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(26 U.S.C. 1952 ed., Sec. 117.)

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